Supreme Court, U.S.
FILED
JUN 18 1997
OFFICE OF THE CLERK

No. 96-1758

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

SHIRLEY and JASON McCLURE,

Petitioners,

v.

THE CITY OF LONG BEACH, et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD R. TERZIAN
Counsel of Record
KRISTIN A. PELLETIER
LeBOEUF, LAMB, GREENE &
MacRAE, L.L.P.
725 S. Figueroa Street
Suite 3600
Los Angeles, California 90017-5436
(213) 955-7300

Attorneys for Respondents

24 pp

QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly held that respondents were entitled to qualified immunity in connection with their alleged violation of petitioners' rights under 42 U.S.C. § 3604 and 42 U.S.C. § 3617, in light of the well-recognized ambiguities in these statutes, and the fact that there was no closely analogous case law interpreting their provisions prior to respondents' alleged acts.

2. Whether the Ninth Circuit correctly held that respondent Zeller was entitled to qualified immunity in connection with his alleged violation of petitioners' procedural due process rights, give the circuit court's finding that petitioners failed to exhaust the administrative requirements necessary to pursue a due process claim.

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STATEMENT OF THE CASE

Petitioners' Petition for Writ of Certiorari (the "Petition") contains a purported "Statement of the Case" which is both irrelevant and inaccurate. The Ninth Circuit below held that this Court's decision in Johnson v. Jones, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), established that factual disputes connected to the qualified immunity analysis could not be resolved on appeal, and that the issue before the court was the essentially legal question of whether the law respondents allegedly violated clearly prohibited their conduct. [See Petition at App.-3 to App.-4.] Because petitioners' recitation of the supposed facts of this case is irrelevant to this issue, respondents will not address the inaccuracies contained therein. However, respondents note that the relevant factual scenario for purposes of the qualified immunity analysis is that set forth by the Ninth Circuit, to wit, whether, at the time of respondents' alleged acts, it was clearly established that the Fair Housing Amendments Act ("FHAA") prohibited city officials from enforcing the building code and remedying admitted health and safety violations, if it is alleged that they had some discriminatory motive for doing so. [Petition at App.-6.] Nowhere does petitioners' factual statement mention or address the Ninth Circuit's finding that petitioners' properties did not comply with the building code, and that these health

and safety violations could have made the properties unsafe for their prospective occupants. [Id.]

ARGUMENT

I. The Requirements Necessary For Certiorari Do Not Exist In This Case.

Rule 10 of the Supreme Court Rules provides that review on writ of certiorari is a matter of judicial discretion, and will be granted only when there are special and important reasons for review. This rule lists the following three circumstances under which a writ of certiorari may be granted: (1) where a decision of a federal appellate court conflicts with a decision of a sister court or state court of last resort on the same matter; (2) where a decision of a state court of last resort decides a federal question in a way that conflicts with another state court of last resort or a federal appellate court; or (3) where a state or federal appellate court has decided an important question of federal law which has not been or should be settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. Because none of these three criteria are satisfied here, certiorari should not be granted.

First, the Ninth Circuit's decision in this case does not conflict with the opinion of any other circuit court. In fact,

as explained below, this decision is entirely consistent with the opinions of other circuits on the issues presented.

Second, there is no state court decision involved here, and the opinion below does not conflict with any decision of a state court of last resort.

Third, the opinion below does not conflict with any decision of this Court, and there is no important question of federal law which must be resolved by the Court. In order to satisfy this latter criteria, the matter at issue must be important to the public in general, as distinguished from merely being important to the parties to the case. Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393, 43 S.Ct. 422, 67 L.Ed. 712 (1923); Rice & Sioux City Cemetery, 349 U.S. 70, 79, 75 S.Ct. 614, 99 L.Ed. 897 (1955). See also, Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994) (Court will not grant review unless issue is important outside the context of the particular litigation, even if doing so is necessary to correct appellate error and ensure justice). Here, however, the Ninth Circuit's opinion is unpublished, has no precedential value whatsoever, and its effect is limited to the parties to this one case. Even if this were not true, the issue is whether respondents are entitled to qualified immunity under the circumstances of this case, a decision which is based not only on the applicable law, but on the specific

situation and conduct at issue here. Moreover, with respect to the only issue that might arguably have any effect beyond this one case--whether qualified immunity applies to Fair Housing Act claims--the Ninth Circuit's opinion is in accord with every other published decision on this topic. In short, because this case does not involve the type of broad-ranging or important federal question which might justify review by this Court, the Petition should be denied. Furthermore, as explained below, even if petitioners could somehow overcome this fatal defect (which they cannot), there is no need for the Court to review the Ninth Circuit's decision, because this case was correctly decided and is in accord with other published decisions on the topic of qualified immunity under the FHAA.

II. Petitioners' Claims Under The FHAA Are Barred By Qualified Immunity.

A. Qualified Immunity Applies To FHAA Cases.

The Petition asserts that qualified immunity does not apply to the FHAA, despite the fact that every court which has addressed this issue has held that immunity is a defense to a Fair Housing Act claim. See, e.g., Meadowbriar Home for Children, Inc. v. Gunn, 81 F.3d 521, 531-32 (5th Cir. 1996) (city officials are entitled to qualified immunity under the FHAA because the "otherwise make unavailable" provision of the statute is unclear, and, "as of 1990, there

were no federal cases or regulations holding that the 'otherwise make unavailable or deny' language imposed personal liability upon officials who have decision-making authority"); Armandariz v. Penman, 31 F.3d 860, 868-69 (9th Cir. 1994) and 75 F.3d 1311, 1316 (9th Cir. 1996) (holding that government defendants had qualified immunity with respect to the plaintiffs' Fair Housing Act claims); O'Neal v. Alabama Dept. of Public Health, 826 F.Supp. 1368 (M.D. Ala. 1993) (state health officer who refused to allow Alzheimer's sufferers to remain at assisted living facility was entitled to qualified immunity because he could have reasonably believed that his actions were lawful); United States General Inc. v. City of Joliet, 432 F.Supp. 346, 355 (N.D. Ill. 1977) (recognizing that city officials could assert good faith immunity as a defense to a Fair Housing Act claim under appropriate factual scenario); United States v. City of Hayward, 36 F.3d 832, 838 (9th Cir. 1994) (arbitrator entitled to absolute immunity under the Fair Housing Act); Baytree of Inverrary Realty v. City of Lauderdale, 873 F.2d 1407, 1409 (11th Cir. 1989) (denial of zoning application is a legislative function entitling government official to absolute immunity). Moreover, even assuming arguendo that it is unclear whether qualified immunity is a defense to a FHAA claim, that fact alone establishes that respondents are

entitled to immunity, since the law in this area is not clearly established.

Equally disingenuous is petitioners' claim that there is no policy reason to apply qualified immunity to a "comprehensive remedial statute" such as the FHAA. Although petitioners have, of their own accord, dubbed the FHAA a "comprehensive remedial statute" which "spells out in detail its provisions and requirements," they have offered no authority for this proposition, and have completely ignored the fact that (as explained below) the courts and commentators have repeatedly recognized that the FHAA is ambiguous and unclear in several important respects.[1] In addition, contrary to petitioners' contentions, there are clear policy reasons for applying qualified immunity to FHAA claims. As this Court pointed out in Owen v. City of Independence, 445 U.S. 622, 655-56, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), the policy which underlies the doctrine of qualified immunity is "the concern that the threat of personal monetary liability will introduce an unwarranted and unconscionable consideration into the decision making

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[1] As such, petitioners misstate the issue when they attempt to pretend that the question here is whether case law must be decided prior to imposing liability under an "unambiguous" statute. It is precisely because the FHAA is unclear that case law is needed to interpret it.

process, thus paralyzing the governing official's decisiveness and distorting his or her judgment on matters of public policy." Clearly, that policy is just as applicable when a public official is sought to be held personally liable under the FHAA as when he or she is sought to be held personally liable under some other federal statute or the United States Constitution.

Petitioners also make much of the fact that FHAA imposes respondeat superior liability and applies to both public and private actors, whereas 42 U.S.C. § 1983 does not. Not only do petitioners fail to explain how or why this has any bearing on the qualified immunity analysis, their assertions in this regard are factually and legally inaccurate. Contrary to petitioners' representations, private parties can be held liable under 42 U.S.C. § 1983, yet not be entitled to qualified immunity. Wyatt v. Cole, 504 U.S. 158, 167-168, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992). In addition, there is obviously a policy reason for allowing qualified immunity to government actors in such cases while denying it to private persons, to wit, the threat of personal liability "paralyzing the governing officials decisiveness and distorting his or her judgment on matters of public policy." Owen, supra, at 655-56; Wyatt, supra, at 1833.

Similarly disingenuous is petitioners' claim that the concept of qualified immunity only makes sense in the

context of section 1983 claims, and is illogical in the context of statutory rights. By definition, all section 1983 claims arise by virtue of the defendant's alleged violation of a federal constitutional or statutory provision. In the latter case, if the underlying federal statute that gives rise to the § 1983 claim is unclear, the defendant is obviously entitled to qualified immunity. Otherwise an individual government defendant could be held liable for violating an ambiguous statute--a concept completely at odds with the doctrine of qualified immunity.

B. Respondents' Entitlement To Qualified Immunity Cannot Be Decided In The Abstract, Without Reference To The FHAA.

Petitioners contend that the determination as to whether their rights were clearly established can be decided in the abstract, without any reference to the provisions of the FHAA. However, this Court has specifically held that the qualified immunity analysis must focus on "the federal right on which the claim for relief is based," not on some other "clearly established duty." Elder v. Holloway, 510 U.S. 510, 114 S.Ct. 1019, 1022, 127 L.Ed.2d 344 (1994). In fact, as the Ninth Circuit recognized below: (1) the question of qualified immunity requires a particularized analysis of the law at issue, not some "abstract right to be free from discrimination in housing"; (2) petitioners here seek to define the right at issue "at a level of generality that the

Supreme Court has rejected"; (3) the FHAA was enacted just one year prior to respondents' acts, for the first time outlawing housing discrimination against the handicapped; and (4) the provisions of the FHAA were themselves unclear, and had not been interpreted or applied under circumstances similar to the present prior to respondents' alleged acts. [App.-6 to App.-8.]

C. Respondents Are Entitled To Qualified Immunity Under § 3604(f).

1. Section 3604(f)(1) Does Not Clearly Define The Type Of Conduct Which Makes Housing "Unavailable" To Handicapped Persons.

Petitioners contend that the provision in § 3604(f)(1) which prohibits conduct which "otherwise make[s] [housing] unavailable" to handicapped individuals is clear because: (1) two cases decided in other circuits[2] years after respondents' alleged acts have broadly interpreted the FHAA; and (2) this provision duplicates the language of 42 U.S.C. § 3604(a) on this topic. The former contention overlooks the fact that case law decided years after respondents' alleged acts is irrelevant to the qualified immunity analysis. Harlow v.

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[2] LeBlanc Sternberg v. Fletcher, 67 F.3d 412, 424 (2d Cir. 1995); Helen L. v. Di Dario, 46 F.3d 325, 333 n.14 (3rd Cir. 1995).

Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The latter assertion ignores the Ninth Circuit's finding that, at the time of respondents' alleged acts, "the standard for proving discrimination under § 3604(a) was not established in this circuit and there was some disagreement among other circuits" on this topic. [App.-7 to App.-8.]

In fact, petitioners completely disregard the acknowledged difficulty and confusion that the courts and commentators have experienced, and continue to experience, in interpreting the FHAA. See e.g., Meadowbriar, supra, 81 F.3d 521, 531-32 (5th Cir. 1996) (city officials are entitled to qualified immunity under the FHAA because the "otherwise make unavailable" provision of the statute is unclear, and, "as of 1990, there were no federal cases or regulations holding that the 'otherwise make unavailable or deny' language imposed personal liability upon officials who have decision-making authority")[3]; Michigan Protection and Advocacy Service, Inc. v. Babin, 799 F.Supp. 695, 711-14 (E.D. Mich. 1992) and 18 F.3d 337 (6th Cir.

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[3] The Petition misstates the holding in Meadowbriar. Rather than "conceding" that individual city officials could be held liable under the FHAA, the court held that it was unclear whether the legislature intended to hold city officials who have decision-making authority personally liable under the FHAA.

1994) (concluding that the "make unavailable" provision only applies to individuals who are in a position "directly to make housing unavailable," i.e., sellers, their agents, or other persons or entities integrally involved in the sale or financing of real estate); Schwemm, Housing Discrimination, § 13.4(1) (1994) (the meaning of the prohibition "which makes it unlawful to 'otherwise make unavailable or deny' a dwelling on discriminatory grounds is not entirely clear"); Familystyle of St. Paul v. City of St. Paul, Minn., 923 F.2d 91, 94 (8th Cir. 1991) (city zoning ordinances limiting housing choices for the handicapped did not make housing unavailable because it did not directly prohibit handicapped persons from purchasing, renting or occupying a private resident or dwelling); Growth Horizons Inc. v. Delaware County, PA., 983 F.2d 1277, 1282-1283 (3d Cir. 1993) (city's termination of a contract with a corporation that provided housing to handicapped individuals, and its refusal to assume the corporation's leases for that housing, did nor directly make unavailable or deny housing to handicapped individuals); Bryant Woods Inn, Inc. v. Howard County, Md., 911 F.Supp. 918, 929-39 (D. Md. 1996). Although petitioners attempt to distinguish these cases on factual grounds, doing so misses the point. The issue for purposes of qualified immunity is not whether the facts of these cases are distinguishable. The issue is whether the law was clearly

established, and the fact that both these courts and the Ninth Circuit continue to find the law confusing years after respondents' alleged acts, definitively establishes that it was not.[4]

2. Section 3604(f)(3)(B) Was Not Clearly Established.

Petitioners also cannot show that § 3604(f)(3)(B) was clearly established at the time of respondents' alleged acts. This provision merely defines the term "discrimination" contained in § 3604(f) to include a failure to make reasonable accommodations. As such, because the applicable provision of § 3604(f) [in this case, § 3604(f)(1)], is ambiguous, so is § 3604(f)(3)(B).

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[4] Petitioners also argue that respondents violated California law as embodied in the Health and Safety Code. Even assuming arguendo that this were true (which it is not), a violation of state law does not establish a violation of the FHAA. Likewise irrelevant is petitioners' claim that, because respondents' conduct allegedly violated the equal protection clause, they also should have known that it violated the FHAA. As explained above, petitioners must prove that respondents' conduct clearly violated the FHAA, not some other statutory or constitutional provision.

Moreover, as the Ninth Circuit noted, there was no case law prior to 1990 which discussed the reasonable accommodation provision of § 3604(f)(3)(B). [App.-8.] Petitioners nonetheless contend that this statutory provision was clearly established at the time of respondents' alleged acts because, subsequent to 1990, some courts have: (1) held that the standards for reasonable accommodation under § 504 of the Rehabilitation Act of 1973 should also apply to claims under § 3604(f)(3); and (2) interpreted the reasonable accommodation clause to impose an affirmative duty on City officials to avoid excluding group living arrangements. Petitioners' argument is meritless for several reasons.

First, the earliest cases cited by petitioners were decided in 1994, over four years after respondents' alleged acts. As such, they are irrelevant to the qualified immunity analysis.

Second, the cases cited by petitioners involved things such as zoning laws or residency fees, not a case where City officials were attempting to remedy uncontroverted health and safety violations that they had a legal duty to correct. The reasonable accommodation provision of § obviously did not entitle petitioners to violate the building code and thereby endanger the health and safety of potential residents of their properties.

Third, petitioners completely ignore the courts' and commentators' acknowledged confusion, years after respondents' alleged acts, as to whether § even applies in cases such as the present. See O'Neal v. Alabama, 826 F.Supp. 1368, 1376 (M.D. Ala. 1993); Schwemm, Housing Discrimination, § 11.5(3)(c) (1994) (noting that the reasonable accommodation provision is new and untested, and that a good deal of litigation will be needed to define its parameters and resolve whether it even applies in "group home" cases).

D. Respondents Are Entitled To Qualified Immunity Under § 3617.

The Ninth Circuit held that 42 U.S.C. § 3617 was unclear for the same reasons as 42 U.S.C. § 3604(f), to wit, that liability under § 3617 was premised on a violation of 3604, and, at the time of the alleged conduct at issue here, the law was unclear as to: (1) what constituted "interference" with a right protected by § 3604; and (2) whether enforcement of admitted building code violations was actionable "interference" if undertaken with some discriminatory motive.

Petitioners contend that the Ninth Circuit's decision is erroneous because it focused on their building code violations, rather than on their supposed unspecified claims of "harassment and intimidation." Not only does this

assertion ignore the interrelationship between these two concepts (to wit, petitioners' claim that respondents harassed and intimidated them by enforcing the building codes, and that it was this enforcement activity that allegedly "made housing unavailable" to them), petitioners are essentially asking this Court to review the record and hold that the appellate court misunderstood or misinterpreted the facts of this case. This is clearly not the function of review by writ of certiorari. Layne, supra; Rice, supra; Ticor Title Ins. Co., supra.

III. Respondents Did Not Violate Petitioners' Clearly Established Due Process Rights.

The Ninth Circuit below held that petitioners could not assert a procedural due process claim against respondents because, by neglecting to appeal respondents' actions pursuant to Long Beach Municipal Code § 18.20.100, they failed to exhaust the administrative remedies necessary to pursue a due process claim. The court also rejected petitioners' excuse for failing to pursue an appeal--that they believed they did not have to do so based on the statements of respondent Zeller--on the ground that there was no clearly established law allowing a procedural due process claim against an official who allegedly denies a particular remedy (in this case, an appeal),

if the official is not charged with implementation of that remedy.

Petitioners take issue with this holding, on the grounds that: (1) the Ninth Circuit erred in finding that respondent Zeller was not charged with implementing their appeal (even though the Long Beach Municipal Code clearly provides to the contrary); and (2) in their opinion, pursuing an appeal would have been futile. In addition to being an inaccurate rendition of events, petitioners are asking this Court to grant certiorari to decide issues of fact. However, as explained above, in order to be entitled to review by certiorari, petitioners must show that there is an important question of federal law that must be decided by this Court, not simply that they disagree with the Ninth Circuit's factual findings. Layne, supra; Rice, supra; Ticor, supra.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

RICHARD R. TERZIAN
Counsel of Record
KRISTIN A. PELLETIER
LeBOEUF, LAMB, GREENE & MacRAE, L.L.P.
725 S. Figueroa Street
Suite 3600
Los Angeles, California 90017
(213) 955-7300

JOHN R. CALHOUN, *City Attorney*
MICHAEL J. MAIS, *Deputy City Attorney*
THOMAS M. REEVES, *Principal Deputy Attorney*
333 West Ocean Boulevard
Long Beach, California 90802
(310) 570-2200

Attorneys for Respondents